BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

STEVEN D. CUTCHLOW Claimant	)	
VS.	)	
UNIVERSITY OF KANSAS HOSPITAL AUTHORITY Respondent	)	Docket No. **1,057,361**
AND	)	
SAFETY FIRST INS. CO. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the November 14, 2011, preliminary hearing Order entered by Administrative Law Judge Steven J. Howard.

The record on appeal is the same as that considered by the ALJ, consisting of the transcript of the September 13, 2011, preliminary hearing; the transcript of the November 8, 2011, preliminary hearing, with exhibits; and all pleadings contained in the administrative file.

ISSUES

The Administrative Law Judge (ALJ) found that claimant sustained a series of repetitive accidents to his bilateral upper extremities arising out of and in the course of the performance of his regular job duties through his last day of work for respondent, April 26, 2011. The ALJ held that the amendments to the Kansas Workers Compensation Act which became effective on May 15, 2011, (New Act) are inapplicable to this claim. The ALJ found that the date of claimant's accident under the law in effect before May 15, 2011, (Old Act) was August 2, 2011, and that respondent received timely notice of the alleged work-related accidents. The ALJ awarded claimant medical treatment.

Respondent requests review of whether claimant sustained repetitive injuries to his bilateral upper extremities arising out of and in the course of his employment with

respondent. Respondent contends that no medical evidence was offered indicating that claimant's use of his hands and arms at work caused his bilateral carpal tunnel syndrome. Respondent also contends claimant failed to provide timely notice of the alleged series of repetitive traumas. In that regard, respondent argues the ALJ incorrectly fixed claimant's date of accident as August 2, 2011, and further incorrectly found that the Old Act applies to this claim. Respondent maintains the New Act applies and that thereunder claimant's date of accident is the date the claimant last worked, April 26, 2011. Respondent argues that claimant's notice is untimely under the notice provisions of the New Act.

Claimant argues that the claim is not covered under the New Act but is instead governed by the Old Act because claimant's last day of work was on April 26, 2011, before the New Act became effective. Claimant also asserts that he provided timely notice of his alleged repetitive accidents pursuant to the Old Act. Finally, claimant maintains that the preponderance of the credible evidence supports the ALJ's finding that claimant's bilateral carpal tunnel syndrome arose out of and in the course of his employment with respondent.

FINDINGS OF FACT

Having reviewed the entire evidentiary record this Board Member makes the following findings of fact and conclusions of law:

Claimant was age 53 on the date of the November 8, 2011, preliminary hearing. He had worked for respondent for approximately 31 years. For the past 20 years he worked as a radiology tech assistant. Claimant was a full-time employee and he worked daily shifts of 8 1/2 hours. His job required him to lift patients; work on the computer; run film in the processors; and transport patients in wheelchairs and carts. He said he used his hands and arms "[j]ust about all day."[1] The amount of time he worked on a computer averaged 5 1/2 hours per day.

Claimant offered into evidence a written job description for radiology assistant which had been signed by claimant and his supervisor on June 15, 2010.[2] The job description indicates that claimant had to lift up to 40 pounds; push over 250 pounds; perform duties requiring manual dexterity; and reach below and above shoulder level. His last day of work for respondent was April 26, 2011.[3] Claimant gave written notice of his alleged repetitive bilateral carpal tunnel injuries on July 31, 2011, or August 1, 2011.

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[1] P.H. Trans., at 11.

[2] P.H. Trans., Ex. 1.

[3] Claimant was terminated by respondent under a point system for excessive absenteeism. P.H. Trans., at 9.

The only medical evidence is a report of an EMG/NCV test performed on July 25, 2011. The referring physician was a cardiologist whom claimant consulted on his own, Dr. George Pierson. The EMG report indicates that claimant presented with complaints of bilateral upper extremity pain and paresthesias for over one year. There is no history in the report regarding how claimant's symptoms developed. No mention is made of claimant's work as either causing or aggravating his symptoms. The report confirms the presence of moderate bilateral carpal tunnel syndrome; however, the physician who performed the test, Dr. Stephen Rosenberg, expressed no opinion about what caused the condition.

Claimant did not testify what effect, if any, his work had on his upper extremities. Claimant did not testify that he associated his pain and numbness with the work he performed for respondent. On the contrary, claimant thought the problems with his hands might have been related to his heart, which presumably prompted him to consult a cardiologist.

Claimant has neither been taken off work nor provided with light duty restrictions by any authorized physician. No doctor provided claimant with a diagnosis in writing indicating that his injuries were work-related.

PRINCIPLES OF LAW

Old Act

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[4] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[5]

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[4] K.S.A. 2010 Supp. 44-501(a).

[5] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[6]

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

K.S.A. 2010 Supp. 44-508(d) states:

> (d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be

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[6] *Id.* at 278.

the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

New Act[7]

L. 2011, ch. 55, sec. 1 provides in relevant part:

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

L. 2011, ch. 55, sec. 5 provides:

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record *unless a higher burden of proof is specifically required by this act*.

L. 2011, ch. 55, sec. 5 also provides in relevant part:

(d) "Accident" means an undesigned, sudden and unexpected *traumatic* event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. *An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.*

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

[7] The italicized portions represent language added to the statutes quoted.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

(f) (1) "Personal injury" and "injury"mean any lesion or change in the physical structure of the body, causing damage or harm thereto. *Personal injury or injuries may occur only by accident, repetitive trauma or occupational disease as those terms are defined.*

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(I) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(I) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(I) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

L. 2011, ch. 55, sec. 16 states:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of *injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:*

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

ANALYSIS

This Board Member finds claimant has not satisfied his burden of proof to persuade the trier of fact by a preponderance of the credible evidence that it is more probably true

than not true that he sustained personal injury by accident, or by a series of repetitive accidents, arising out of and in the course of his employment with respondent.

There is no evidence in this record which establishes that claimant's bilateral carpal tunnel syndrome was caused by his job for respondent. There is no medical opinion in evidence that there exists the requisite causal connection between claimant's job requirements and the bilateral entrapment of claimant's median nerves. The report of the EMG testing supports the finding that claimant has moderate bilateral carpal tunnel syndrome. However, that report contains no reference to claimant's job and makes no connection between claimant's employment and the onset of his upper extremity pain and paresthesias. Claimant's testimony that his job duties required frequent use of his upper extremities is corroborated by the written job description and undoubtedly carpal tunnel syndrome can be caused by repetitive use of the upper extremities. However, carpal tunnel syndrome can have a variety of etiologies.

Claimant contends the Board's decision in *Hamilton*[8] supports the ALJ's finding in this claim that claimant successfully proved personal injury by accidents arising out of and in the course of employment. In *Hamilton*, the Board's Order quotes the ALJ in finding the claim compensable:

> There were no medical reports stating whether the claimant's carpal tunnel was work related or not. The claimant associated her hand problems with her job duties, and the claimant's testimony itself is substantial evidence of causation. The kind of activities she described with the spray bottles and the pressure washer wand are grasping activities commonly seen in workers compensation carpal tunnel claims. Even if the activity was as little as 2 hours per day, as suggested by Mr. Zari, it seems plausible that the activity caused the hand symptoms, as the claimant alleged. There was no evidence of another source for the claimant's carpal tunnel syndrome.[9]

The fallacy in claimant's reliance on *Hamilton* is that Ms. Hamilton associated her hand problems with her job duties. There is no such evidence in this record. Mr. Cutchlow briefly described his job, but he did not describe whether or how his symptoms were related to his work for respondent.

The parties vigorously argue the issue of what "date of accident" should be assigned to this claim and whether the matter is governed by the Old Act or the New Act. However, those issues need not be decided because claimant has failed to sustain his burden of

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[8] *Hamilton v. Fabric Print, Inc.*, No. 1,035,257, 2007 WL 3348551 (Kan. WCAB October 9, 2007). (*Hamilton* involved a preliminary order, so only one member of the Board determined the outcome of the review.)

[9] *Id.* at 2.

proof under both the Old Act and the New Act that his bilateral carpal tunnel syndrome arose out of and in the course of his employment. It is also unnecessary to decide the issue of whether timely notice was provided.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.

CONCLUSIONS

(1) Claimant has not satisfied his burden of proof to persuade the trier of fact by a preponderance of the credible evidence that it is more probably true than not true that he sustained personal injury by accident, or by a series of repetitive accidents, arising out of and in the course of his employment with respondent.

(2) Conclusion (1) above is the same regardless of whether the provisions of the New Act or the Old Act apply to this claim. It is therefore unnecessary to decide which Act applies, the date of accident, and whether timely notice was provided to respondent.

(3) The preliminary order awarding medical treatment to claimant must accordingly be reversed.

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Steven J. Howard dated November 14, 2011, is reversed.

IT IS SO ORDERED.

Dated this _____ day of January, 2012.

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HONORABLE GARY R. TERRILL
BOARD MEMBER

c: Mark E. Kolich, Attorney for Claimant
Frederick J. Greenbaum, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge

[10] K.S.A. 44-534a.